IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.748 OF 2005
IN
EXECUTION APPLICATION NO.54 OF 2001
IN
SUMMARY SUIT NO.3569 OF 1999

Ramchandra Ganpat Nimbalkar ..Plaintiff.

V/s.

Smt.Hirakani Sanatkumar Dixit & Ors. ..Defendants.

And

The Saraswat Co-op.Bank Ltd. ..Claimant.

Mr.Atul Damle for plaintiff.

Mr.Yogesh Adhia for Defendants No.1,3 and 4.

Mr.Prashant Naik i/b Y.R.Naik for claimants.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 27, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings and documents on record.

2. By this chamber summons, the plaintiff has approached this court essentially questioning the view taken by the Commissioner for taking Accounts in his order dated 21st June, 2005 that the plaintiff will have to obtain leave of the court before proceeding in the matter in relation to the property

attached by Sheriff of Bombay consequent to the execution of exparte decree which is passed prior to the order of DRT dated 2nd November, 2004 in Appeal No.105 of 2004. Brief facts for deciding the issue raised in the present application are as follows:

3. Exparte decree was passed in favour of the plaintiff in Suit No.3569 of 1999. In execution of the said decree, warrant of attachment came to be issued. On 10th April, 2001, Attachment was levied in respect of the immovable properties belonging to and in possession of Smt.H.S. Dixit, Shri P.S.Dixit and Shri Rajesh S. Dixit and Hotel Shantidoot and, furniture, fixtures, fittings, stock in trade and all other movable lying in the place of business premises of the defendants who were carrying on business in the name and style of M/s.Hotel Shantidoot, situated at 1st, 2nd and terrace floor of the New Hindmata Cloth Market Building, Opp. Hind Mata Cinema Theatre, Dr.Ambedkar Road, Dadar(E), Mumbai 400 014 and all the right, title and interest of the defendants in the good will of the said business who have tenancy right of the said business premises as a going concern. Later on, the defendants took out Notice of Motion for setting aside the exparte decree passed against them. The said Notice of Motion was

eventually rejected, which order came to be confirmed up to the Apex Court. In other words, exparte decree passed against the defendant has been confirmed. The warrant of attachment issued in respect of the property referred to above in execution of the said exparte decree is also operative against the said defendants.

4. Thereafter, however, the claimants Saraswat Co-operative Bank Ltd. claiming to be the secured creditor have invoked provisions of section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 against the defendants. Notice in that behalf was issued on 22nd December, 2003. Thereafter, the claimants have taken over possession of the properties referred to in the notice in Schedule B of the notice. Reference, interalia, is made to the properties for hypothication of furnitures, fixtures, utensils, equipments and fixed assets and also to equitable mortgage of premises situated on ground floor and entire first and second floor with terrace at third floor level in building known as Shantidoot Hotel. It is seen that defendants challenged the action of the claimants of proceeding against aforesaid properties, by way of appeal before the

DRT. In the said appeal, consent order was invited by the defendants and the bank whereunder court receiver came to be appointed in respect of the disputed properties. The grievance of the applciant/plaintiff is that the fact that there was already order of attachment operating in respect of the properties was not disclosed to the DRT and a collusive order was obtained from the DRT which, in turn, would impinge upon the rights of the plaintiff arising under the exparte decree which has been confirmed right up to the Apex Court. On this argument, it is contended that the question of requiring the plaintiff to seek leave of the court to proceed with the execution does not arise and to that extent order passed by the Commissioner for taking accounts cannot be sustained and will have to be set aside.

5. Having considered the rival submissions and going through the records, I find substance in the submission canvassed on behalf of the claimants that the attachment effected under the orders of this court is also in respect of movables lying in the premises known as Hotel Shantidoot and all the right, title interest of the defendant, therein including the good will of the defendant together with the

tenancy right of the said business premises as a going concern. Whereas, the claimants have proceeded only against the movable properties being furnitures, fixtures, utensils, equipments and fixed assets in the premises in question. No action is taken by the claimants in respect of the right, title and interest of the defendants in the good will of the business together with the tenancy rights of the business premises as a going concern. Indeed, action initiated by the claimants in respect of the movable properties lying in the said premises would overlap with the order of attachment warrant issued by this court in execution of the exparte decree. The appropriate course for the plaintiff in that regard will be of invoking remedy of appeal under section 17 of the Act of 2002. As there is no attachment with regard to the building premises in which Hotel Shantidoot is being operated, the question of any overlapping interest of the claimants and plaintiff herein does not arise.

6. Accordingly, for the interest with regard to the movable properties lying in the said premises, the plaintiffs applicant will have to take recourse to remedy of appeal under section 17 of the Act, 2002. This position is fairly accepted by the

counsel appearing for the parties. Accordingly, this chamber summons is disposed of with the above observations. In other words, further steps on the basis of attachment in respect of right, title and interest in respect of other properties can proceed in accordance with the law.

7. Ordered accordingly.